87-1082

Supreme Court, U.S.
FILED
JAN 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 871080

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

TARRANT COUNTY HOSPITAL DISTRICT, *Petitioner*

v.

THE HONORABLE WILLIAM L. HUGHES, JR.,
Respondent

Jacksons' Reply to Petition for Writ of Certiorari to the Court of Appeals for the Second Appellate District of Texas

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Jacksons' Reply to Petition for Writ of Certiorari to the Court of Appeals for the Second Appellate District of Texas

TO THE HONORABLE JUSTICES OF THE U.S. SUPREME COURT:

Now comes Belinda Jackson, Individually, and in behalf of the Estate of Tristainne O. Jackson, Deceased, the real parties in interest, and submits this Reply to Petition for Writ of Certiorari to the Court of Appeals for the Second Appellate District of Texas and respectfully urges this Court to deny Petitioner's Writ of Certiorari.

PERSPECTIVE

Blood banks are attempting to immunize themselves or to so minimize their liability that proving the veracity of their conduct would be next to impossible. The blood bank industry is a vital industry to the preservation of life. Blood, however, is not a safe product [see deposition excerpt of Dr. Peter Lazarus, a physician with JPS Hospital, Appendix A-1]. It can

transmit life-threatening, infectious diseases. The standard of care that blood banks use in obtaining blood from voluntary blood donors should not be above scrutiny. Their word should not be inviolate. The veracity of the statements of their personnel, even under oath, should not go unquestioned. Drug companies are subject to scrutiny. Physicians are subject to scrutiny. Manufacturers of life saving medical equipment are subject to scrutiny. It seems that the rights of victims, those that received disease infected blood, have been lost in the shuffle by blood banks' efforts to immunize themselves from accountability. Blood banks realized the seriousness of hepatitis at the time they got legislation passed that struck down implied warranty and strict liability in Texas (see former Article 4590-3, V.C.R.S.), as well as other states. They now realize the seriousness of AIDS infection by transfusion and are trying to head off the troops at the pass. To some extent, they have succeeded in the recent Texas Legislature (70th Legislative Session, Tex. H.B. 1829) whereby names and addresses of donors remain confidential. This case is one of the few "grandfather" types of cases to which the present legislation specifically excepts from such "confidentiality" (Tex. H.B. 1829, Sec. 28). Not only should the rights of victims of transfused AIDS infected blood be put onto the scales of justice but also the total threat to our society that AIDS poses. The true victim is the recipient of the AIDS infected blood. Their life will never again be the same, nor very long. Realistically, we do not live in a society of total chastity. AIDS is a blood and sexually transmitted disease which, once contracted, has no cure now or in the near future.

According to the major findings by Hew Task Force, July, 1983, which is incorporated under the National Blood Policy, 39, Fed. Reg. 32701 (Sept. 10, 1974), approximately 25% of the blood is never transfused due to outdating! If these figures

hold true today, then presently about 4 million units of blood are WASTED annually!

When it comes to the rights of society to safe disease-free blood, the conduct of blood banks must not be held sacrosanct. They must be scrutinized and not immunized.

ARGUMENT AND AUTHORITIES

I.

THE DONOR'S CONSTITUTIONAL RIGHT OF PRIVACY IS NOT INVIOLATE

The donor's right of privacy is not inviolate, particularly in light of the trial court's order and supplemental order.

In 1973, the Texas Supreme Court, in *Billings v. Atkinson*, 489 S.W.2d 853, 859 (Tex. 1973) recognized a broader definition of right to privacy, but specifically limited its application to an *unjustified, unwarranted* invasion of one's private affairs to be *public*. The discovery of witnesses is totally justified and warranted to the administration of justice in this case. Victims have rights. These rights deserve equal consideration, of which only the court system can protect. In our case, blood donor identities will not be made public. Their depositions, if needed, could be taken and their names remain confidential even to the jury. Texas has a substantial interest in seeing that the discovery process permits every person to discover evidence necessary to the presentation of his or her case. *Ex Parte Able*, 613 S.W.2d at 267 (Spears, J., dissenting). Without such a right to discovery, Texas would be unable to provide its citizens a Forum for effective dispute resolution. Ms. Jackson and other innocent citizens need to know the facts surrounding an AIDS death. The invasion into a donor's privacy interest, if one exists, is slight. These donors, however, are key witnesses. The donors are the only people who can relate what actually happened. It is essential to our case to

prove that in all likelihood the decedent's death was the result of AIDS infested transfused blood.

The duty to testify has been regarded as so necessary to the administration of justice that the witness' personal interest and privacy must yield to the public's overriding interest and full disclosure. *United States v. Calandra*, 414 U.S. 338 (1974) (citing *Blair v. United States*, 250 U.S. 273, 281, 1919)).

In *Giffin v. Smith*, 688 S.W.2d 112 (Tex. 1985) the Supreme Court states that "[T]he plain language of Rule 166b thus makes it clear that information concerning the identity and location of persons having knowledge of relevant facts can never be protected from discovery." The persons who donated the blood which was transfused into Tristainne Jackson are persons with knowledge of relevant facts concerning the donor screening procedures utilized by JPS Hospital at the time. JPS Hospital admitted to us a donor has subsequently tested positive, but will not disclose the confirming document with or without the name of the donor. The death certificate issued by JPS shows Decedent died from natural causes [Appendix A-2]. Ms. Jackson's tests for AIDS are negative [see excerpts from deposition of Dr. Peter Lazarus with JPS Hospital, Appendix A-1]. "No man is to be denied the enforcement of his rights merely because another possesses the facts without which the right cannot be ascertained and enforced." *Ex Parte Able*, Id. at 268 (Spears, J., dissenting) (quoting 58 AM Jur, Witness, Sec. 29; 8 Wigmore, Evidence, Sec. 2212). JPS Hospital is fighting hard for the implementation of a privilege to protect itself by diverting society and Ms. Jackson and other innocent citizens from the truth, rather than truly seeking to protect donors from embarrassment. Besides, there is no need to embarrass any donor in this case but merely to review the standard of conduct of JPS Hospital in the total procedures used in screening and/or testing its donors. In *Whalen v. Roe*, 429 U.S. 589, 52 L.Ed. 2d 64, 97 Sup.Ct. 869

(1977), a New York statute required that physicians identify patients obtaining prescription drugs having the potential for abuse by name and address for centralized computer filing. A class action by doctors and patients using these drugs was filed attacking its constitutionality. THEY ARGUED, IN PART, THAT IT INVADED THE PATIENT'S RIGHT OF PRIVACY AND WOULD DISCOURAGE PATIENTS TO USE AND DOCTORS TO PRESCRIBE THE DRUGS. The United States Supreme Court upheld its constitutionality and rejected the right of privacy argument.

The Rhode Island Supreme Court in *Bartlett v. Danti*, 503 A2d 515 (R.I. 1986) held unconstitutional a provision in the confidentiality of health care information act exempting confidential health care information from compulsory legal process. It reasoned that it violated the *guaranteed constitutional right to justice* to all persons by precluding litigants from obtaining and introducing material evidence whereby litigants would be prevented from effectively presenting their claims before a trier of fact.

Justice Spears in his *Ex Parte Able* dissenting opinion, which was joined by Justices Campbell, Ray and Wallace, on p. 266 recognized that the right to privacy is not absolute but instead, "The individual's right of privacy must be weighed against the impact and the threat involved in a state requiring disclosure." See also *Roe v. Wade*, 410 U.S. 113 (1973) at 178.

JPS Hospital keeps discussing public disclosure of very personal and intimate details of the lives of blood donors. The trial court has already shown its determination to give the blood donors adequate protection. I believe that the trial court will prevent harassment of and public disclosure of the donors' personal lives, of which concern I equally share.

II.

SOCIETY HAS AN INTEREST IN A DISEASE-FREE BLOOD SUPPLY

A. Our Jurisdiction has recognized that it is to society's best interest to disclose donor identities, and afford the victim equal access to the Court System.

Our society has a substantial interest in protecting its citizens from diseased blood. Ms. Jackson's request for the identity of the donors does not present an "unwarranted invasion" of the donor's privacy when viewed in light of the public's need for a disease-free blood supply. Negligent blood banks must be held responsible for their acts.

Granting access to the identity of a donor is essential, as I do not wish to rely upon the veracity of any witness for JPS Hospital. Please note that in the *Hoder v. Sayet*, 196 So.2d 205 (Florida, 3rd Dist.Ct.of App.-1967) case Albanese (the donor) testified by deposition that he was asked none of the donor screening questions prior to the taking of his blood by the blood bank. This shows how crucial information can be obtained only by talking to the donors themselves. There is no assurance that various documents kept on donors would not be destroyed, misplaced, or unavailable. Ultimately, the donor may be the only source for critical, unbiased information. The article written by Wyatt, *AIDS, Legal And Ethical Concerns For The Clinical Laboratory*, 4 J.Med.Tec. 108-09 (1987), to some extent is a self-serving article by a medical lab technician.

Our courts have considered the issue of donor confidentiality. Our trial courts have protected donor confidentiality from third persons with appropriate protective orders. Our jurisdiction has weighed the public interest in maintaining a safe disease-free blood supply, and the donor's right of privacy.

There is no evidence that JPS Hospital promised confidentiality to any of its donors in this case. Even if there were, it would not outweigh *the rights of* Ms. Jackson and Decedent, *the victims, to equal access to the court system* with the opportunity for full disclosure.

Some *Rasmussen* differences include the following:

1. Texas Rule 166b specifically provides: "Nothing in this paragraph 3 shall be construed to render non-discoverable the identity and location of . . . any person having knowledge of relevant facts . . . ." An adequate protective order has been entered in our case.

2. Florida has a state constitutional provision granting a state constitutional right to privacy that Texas does not have. Frankly, in my opinion their state constitutional provision is unconstitutional if it would prevent the type of discovery that is sought in this case.

3. The Florida Supreme Court assumed that there would be a prospective inquiry into one's private life and potential association with AIDS. However, we are not concerned with the details of one's private life. We are merely concerned with what screening procedures JPS Hospital did regarding the private lives in "high risk groups." Our trial court will monitor this. The original dissenting opinion of our Texas Court of Appeals in this case points out that the United States Supreme Court has held a number of essential activities outside marriage do not involve fundamental areas of privacy, such as homosexual conduct *Bowers v. Hardwick*, ____ U.S. ____, 106 S.Ct. 2841, ___ L.Ed.2d ____ (1986) and prostitution (*Caminetti v. United States*, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 (1971). I would assume drug abuse in this category as well. We have had two trial courts, after both adequately protected the rights of the donors, permit limited discov-

ery. One being the Respondent in our case, Judge William L. Hughes, Jr., and the other being the Honorable Sam Houston, Judge of the 211th District Court of Denton County, Texas, in the *Wadley* case.

The New York trial court, in *Kreiger v. Airweld, Inc.*, No. 3109/85, stated that it did not have to decide the question before it on a constitutional point. In the *Taylor v. West Penn Hospital*, No. GD87-00206, slip. op. (Pa.Ct.Comm.Pleas Aug. 12, 1987) the Court lost sight of several practical considerations.

1. The Court states that the denial of the discovery request does not significantly interfere with Plaintiff's ability to present its best case against the blood bank. However, it is only through liberal discovery that Ms. Jackson has the most significant opportunity to present her best case against the blood bank.

2. It states "the jury's finding will turn on whether the procedures which the blood bank states that it used were reasonable and whether the blood bank followed those stated procedures." This, of course, assumes that each individual who testifies in behalf of the blood bank is totally candid and all appropriate documents have been faithfully produced.

3. "Even if the donor's identity were revealed . . . The blood bank would argue that the donor was either lying to protect himself or that his testimony was not credible." Maybe so, but at least the jury would have the opportunity to weigh the credibility of the evidence.

4. The court on page 19 states "the lawsuit is not the primary deterrent against negligent practices of a blood bank." So what? What about the rights of the victim? Should the blood bank be exempt from review of its negligent practices? What about punitive damages, when

applicable? Any negligent practice of a blood bank is not deterred when they know that their conduct will not be subject to full disclosure. Lab Technicians that run the test on blood products are human and are subject to error like all humans. What if they inadvertently record the wrong result? The only confirming way to denote AIDS transmission would be through donor identification.

B. There is no evidence that the voluntary blood supply will be significantly affected, if at all.

JPS Hospital pursues the argument that disclosure of blood donors will discourage volunteers from donating their blood whereby the volunteer blood system could be destroyed. No real evidence has ever been produced by JPS Hospital or anyone else that would verify that statement. According to the September/October 1986 Lifeline, Bi-monthly News Magazine of the Blood Center at Wadley Blood Center in Dallas, Texas, contrary to confidentiality, it discloses several volunteer donors to-wit: J. A. Summer (a 3-gallon donor), Teresa Dacus, a group picture of donors on page 6, etc. [Appendix A-3]. Wadley is one of the blood centers actively pursuing the "confidentiality" argument. *Wadley Research Institutes, d/b/a The Blood Center at Wadley v. Honorable Sam Houston*, Cause No. 2-87-104-CV. Additionally in *Hutchins v. Blood Services of Montana*, 506 P2d 449 (Mont. 1973), Plaintiff received not only the identity of the donor but also testimony from the donor. The Supreme Court of Montana published the name of the donor, Sharon Holme, on page 451. In the *Hoder* case, Plaintiff received the identity of the blood donor and was allowed to depose the donor. The court disclosed the name of the donor, Albanese. Both *Hutchins* and *Hoder* involved hepatitis contracted through blood transfusions. The blood donors' names that were revealed and testified did not affect the blood supply, volunteer or otherwise. The predecessor statute to the Tex. Civ. Prac. and Rem. Code, Sec. 77.003 was

enacted in 1971. It provided that a blood donor may be sued for negligently donating blood, Article 4590-3, V.T.C.S, and this has not hindered the volunteer blood donor system. According to the National Blood Policy of 1974, 8.8 million units of blood were collected per year. As of 1986, it increased to 12 million units, according to the Money Magazine Article. Contrary to JPS Hospital's assertions, the evidence is overwhelming that the donation of blood has increased. See also Appendix A-4 for an affidavit from Mr. Jack Schwartz, a volunteer blood donor, which was originally attached to my brief before the Texas Supreme Court.

Clearly, JPS Hospital has failed to establish their burden of proof of privilege or immunity regarding the subject discovery at hand. *Weisel Enterprises, Inc. d/b/a Builder's Choice v. The Honorable Peter Michael Curry, Judge, et al*, 718 S.W.2d 56 (Tex. 1986); *Peoples v. Fourth Supreme Judicial District*, 701 S.W2d 635, 637 (Tex. 1985); *McAllen State Bank v. Hon. Homer Salinas*, Cause No. 13-87-316-CV (opinion attached to Appendix, A-5).

C. *Rasmussen* involved unbridled discovery

In *Rasmussen v. South Florida Blood Service*, 500 So.2d 533 (Fla. 1987) is not in point because the blood bank was not even a party to the lawsuit, and Plaintiff sought unbridled discovery without seeking any limitations or restrictions by the trial court, which was specifically pointed out in its decision, and as a part of its argument regarding the potential abuses of unbridled discovery. JPS Hospital has posed the same argument as Florida to a different fact situation. Our case does not seek unbridled discovery. As pointed out by our Texas Court of Appeals, there is no abuse of discretion by our trial court.

D. Blood Business is profitable but not efficient in blood unit preservation

As of 1986, the blood bank industry had become a billion dollar business, according to an article written by Rock, *Inside The Billion-Dollar Business Of Blood*, Money Magazine, 153-172, March 1986. In that article, we also learn that the American Red Cross collects half of the 12 million units of blood that is collected annually. The Blood Services Division of the American Red Cross had a tax free profit of 41.2 million dollars in its fiscal year ending June 30, 1985, before property and equipment acquisitions. Total revenues were more than 466 million dollars. Only two percent of its annual budget was spent on research. The excess revenues were not spent on its own expansion. It received in public donations $17,000,000.00 for a planned research facility in Rockville, Maryland. The surplus went into a balance sheet category called Accumulated Net Assets. [pg. 158 of (Money)]. As previously noted, 25% of blood units collected is wasted. Research money would be well spent on the more efficient handling of blood.

E. "Practical" immunity from litigation encourages blood bank dilatory practices

It is an absolute necessity to make the blood donor industry accountable for their actions. If they are allowed to go, for all practical purposes, unmonitored by society and the Courts, they will move slowly in conquering problems with their blood products. In Money Magazine article, it points out that by 1978 the first AIDS-like virus was suspected and was confirmed positively in 1981 to be AIDS. On December 4, 1982, the Center for Disease Control presented Blood Products Advisory Committee with mounting evidence that AIDS was being spread through the blood supply. No action was taken. On January 14, 1983 the National Hemophilia Foundation asked blood and plasma collectors to adopt screening proce-

dures to discourage donations from high-risk groups, but blood banks continued to accept blood from all donors. It was not until March 4, 1983, when the U.S. Public Health Service announced that high-risk groups should not donate, that the blood banking organizations passed on any information to their members. On March 24, 1983, only some blood banks began to implement screening procedures on donors. Even though there were many recommendations made by the Food and Drug Administration and the Center for Disease Control, the blood banks moved very slowly to control the blood related transmission of the AIDS virus through their product. It was really not until 1985 when the first AIDS antibody test was developed that a unified screening procedure of blood products was instituted by the blood banks. Before 1985, there were other tests available to help identify people with the AIDS virus that could have been instituted to help wean out people that were at high risk for this deadly disease. These tests were the antihepatitis core antibody test, the CMV titer, and helper/suppressor ratio, according to the article written by Samuel, *Infectious Complications of Blood Transfusion*, 11 Seminars In Oncology, 68-76, (1984). Not all had been done by the blood bank industry that was possible to make blood a safer product, until absolutely forced by governmental agencies.

F. Recent Texas Legislation

1. Recent Texas legislation provides that a blood bank may report positive donor blood tests "to the recipient of the blood."

In the 70th Texas Legislative Session, Tex. H.B. 1829, Sec. 9.03(h) states in part that a blood bank may report blood test results to the recipient of the blood, though it does go on to state that identities will not be revealed. This particular legislation is only applicable to lawsuits that are filed after Sep-

tember 1, 1987, see Sec. 28. Our suit was filed before this legislation was to take effect.

2. Blood donation is not a private affair

The *Taylor* case did point out that the likelihood of pursuing litigation against a donor was remote. To that extent I concur with the *Taylor* case. However, the Texas Blood Statute, Sec. 77.003 of the Texas Civil Practice and Remedies Code (formerly Article 4590-3, V.T.C.S.), informs us that blood donation is not a private affair. "[A] person who donates a human body [blood] . . . remains liable for the person's own negligence." By holding donors liable, for their negligence, mandates that the donation of blood is not a private affair. Application of a right of privacy to the disclosure of a blood donor's identity would render Sec. 77.003 meaningless. It is well settled that the intention of the legislature in enacting a statute is the statute itself, and aim and object of construction is to ascertain and *enforce the legislative intent, and not to defeat, nullify, or thwart it. City of Mason v. West Texas Utilities Company*, 237 S.W.2d 273 (Tex. 1951). By enacting Sec. 77.003, the legislature has determined that the identity of donors is discoverable.

III.

PRECEDENT BY THE SUPREME COURT IS NOT NECESSARY

Each Case must be decided on its own facts. The balancing interest must be weighed. In our case, it is obvious that the trial court has closely monitored discovery to avoid *UNDUE* publicity and intrusion into the private lives of donors. Yet, it permits us discovery that will help in proving our case.

The Supreme Court has already established certain guidelines, which have been followed in our case. The Court of Appeals noted that JPS Hospital failed to prove the particular

immunity at issue, which has yet to be proven. The Court of Appeals, based upon the trial court's rulings in this case, carefully explored the constitutional questions presented. No one's rights have been ignored in Texas, only adequately safeguarded.

CONCLUSION

In conclusion, there has been no invasion of the constitutional right to privacy to any blood donor. Societal interest in a safe blood supply and the constitutional right to equal protection, access and justice in the court system for innocent citizens far outweighs any alleged privacy rights of donors. Adequate protection and utmost concern for blood donors has been provided by court order.

If people are discouraged from giving blood that are in the high-risk group for AIDS, the goal of the blood banks has been met to make the blood supply a safer product. Ms. Jackson took both the HTLV-III blood test and the Western Blot test and was cleared of AIDS. We already know that someone out there who gave blood to the deceased has since tested positive as an AIDS carrier. We are entitled to full disclosure of the circumstances surrounding the obtaining of blood by the JPS Hospital Blood Bank.

As necessary and worthwhile as the blood bank industry is, it is also a billion dollar industry that is attempting to discourage anyone from scrutinizing its conduct on a "one on one" basis. Not another person, firm, or company enjoys this luxury.

Respectfully submitted,

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DEPOSITION EXCERPTS OF DR. PETER LAZARUS TAKEN AUGUST 6, 1986

Page 50

Q. Are you aware that Mrs. Jackson, the mother,–
A. I heard she had a negative AIDS test.
Q. Right. Both the HTLV III as well as the Western Blot.
A. I had heard that, yes, sir.

* * *

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Q. Can we agree that blood, though at one point–and certainly is life saving–at the same time at the other end of the sword it can be a dangerous product?
A. Yes.

* * *

STATE OF TEXAS
CERTIFICATE OF DEATH

1. Name of deceased (type or print)
   (a) First TRISTAINNE (b) Middle
   (c) Last JACKSON

2. Sex FEMALE 3. Date of death 12-21-85

6. Date of birth 2-21-83

8a. Place of death–county TARRANT
8b. City or town [if outside city limits, give precinct no.] FORT WORTH
8c. Name of hospital or institution [if not in hospital, give street address] JOHN PETER SMITH

20. Part I Conditions, if any, which gave rise to immediate cause stating the underlying cause last

Immediate cause [enter only one cause per line for (a), (b), (c)]

(a) due to, or as a consequence of: Respiratory Failure

(b) due to, or as a consequence of: Chronic diffuse interstitial lung inflammation

(c) due to, or as a consequence of: [blank]

21. Autopsy? NO

23a. To the best of my knowledge, death occurred at the time, date, and place and due to the cause(s) stated [Signature and title] /s/Peter Lazarus, M.D.

23b. Date signed [mo., day, yr.] 1-10-86
23c. Hour of death 2:59 P.M.
23d. Name of attending physician [type or print] PETER LAZARUS, M.D.

Lifeline
The Bi-Monthly News Magazine of THE BLOOD CENTER at Wadley
September/October 1986 Volume VII Number 5

Page 3 [Picture of donor and Shields]
J. A. Summer, left, a three-gallon donor, donates during the recent 4th of July blood drive as Eddie Shields, Wadley phlebotomist, looks on.

Page 4 [Picture of Ms. Dacus]
Theresa Dacus has donated every 56 days for the past five years! She became a member of the CMV negative "honor roll" more than two years ago.

Page 6 [Group picture of donors]
The Blood Center and The Associates hosted a reception in early June to honor The Associates' gallon and multi-gallon donors. Dorothy DeGuch, front row center, is The Associates' blood drive coordinator.

Page 6 [Picture of student donor]
A happy student donates at the Texas A&M summer blood drive.

IN THE SUPREME COURT OF TEXAS

No. C-6771

TARRANT COUNTY HOSPITAL DISTRICT, *Relator*

v.

THE HONORABLE WILLIAM L. HUGHES, JR., JUDGE, 48TH DISTRICT COURT, *Respondent*

AFFIDAVIT

BEFORE ME, the undersigned authority, personally appeared JACK SCHWARTZ, who under oath stated the following:

"My name is Jack Schwartz. I have given blood on a consistent voluntary basis for 44 years. I have read where AIDS infested blood can be passed to an innocent recipient of a blood transfusion. I have no concern with anyone ever questioning me or taking my testimony under oath regarding my personal background or personal habits in connection with any blood that I have donated. I would still continue to volunteer my blood free of charge. I am in favor of our nation's blood supply being as safe as possible. If questioning of blood donors or scrutinizing blood donors who have furnished blood helps to accomplish this in any way, it's okay with me."

SIGNED this 1st day of November, 1987.

/s/ Jack Schwartz

SUBSCRIBED AND SWORN TO before me this 1st day of November, 1987.

/s/ Dorothy Manuel
Notary Public, State of Texas
Name Printed: Dorothy Manuel
My Commission Expires: 9-19-89

AFFIDAVIT–Solo Page

COURT OF APPEALS
THIRTEENTH JUDICIAL DISTRICT OF TEXAS
CORPUS CHRISTI

No. 13-87-316-CV

McALLEN STATE BANK, RELATOR, *Appellant*,

v.

THE HONORABLE HOMER SALINAS
DISTRICT JUDGE, 92ND JUDICIAL DISTRICT,
Appellee.

On appeal from the 92nd District Court
of Hidalgo County, Texas.

Before Paul W. Nye, C.J.; Robert J. Seerden, and
Fortunato P. Benavides, J.J.

OPINION

In this original mandamus proceeding relator seeks to have this Court issue a writ of mandamus directing respondent to rescind two protective orders and to grant relator's motion to compel discovery. The trial court's orders prohibited discovery of certain evidentiary matters allegedly needed in the prosecution of plaintiff's case and in the defense of a counterclaim asserted by the real parties in interest. We granted the application for leave to file and after the hearing we now grant the issuance of the writ and conditionally order the writ to issue.

McAllen State Bank, the plaintiff and counterdefendant in the cause of action below, is the relator in this action. Rio Grande Bancshares, Incorporated (Bancshares) and individual defendants, the defendants and counter plaintiffs, are the real parties in interest (collectively referred to as defendants).

In 1984 Bancshares purchased all of the outstanding stock of First State Bank of Edinburg. The purchase was financed in part by a $5 million loan from relator, secured by all the outstanding stock of First State Bank. Prior to the execution of a note, incident to the loan, the individual defendants, stockholders of Bancshares, signed a letter agreement in which they promised to maintain a capital-to-assets ratio in First State Bank which would be satisfactory to all banking authorities.

According to relator's allegations, in late 1985, financial problems with First State Bank were discovered by the Texas Banking Department. A meeting with the Banking Department on February 14, 1986, resulted in changes in management of the bank. The Banking Department required First State Bank to submit a plan on how to meet a minimum satisfactory level of capital. Another meeting was held in May of 1986, which included federal and state regulators. Apparently, in response to this meeting, relator notified Bancshares of its acceleration of the indebtedness, and its demand for payment in full of the $5 million loan. On May 23, 1986, First State Bank was closed by the banking authorities.

Relator then filed suit for collection of the note and for breach of the agreement to maintain capital ratios by the individual stockholders of Bancshares. In September of 1986, during a deposition, Rupert Richards, one of the individual stockholders in Bancshares and a defendant in relator's suit, asserted his right to refuse discovery based on a claim of privileged communications with banking officials.

Defendants then filed a motion for a protective order with the Honorable Homer Salinas, Judge of the 92nd District Court, asserting that the information and documents requested were privileged under Tex. Rev. Civ. Stat. Ann.

Art. 342-210 (Vernon Supp. 1987)[1] and therefore not subject to discovery. The motion was heard the next day and respondent issued the first protective order. This order prohibited discovery of the following items:

(1) Information obtained by or furnished to the Banking Department;

(2) Communications, oral or written, between the Banking Department and First State Bank, or Bancshares; and

(3) Records and documents of any nature regarding paragraphs one and two.

In March of 1987 defendants filed a first amended answer and counter-claim. In its counter-claim, Bancshares and the individual stockholders alleged that the capital maintenance agreement, which relator contends provides for the personal liability of the individual stockholders of Bancshares, was not the standard practice in interbank loans made by relator, in contravention of relator's promise to First State Bank that it would use standard loan practices. The answer and the counter-claim also alleged that relator fraudulently hid this fact from the defendants. Eventually, as First State Bank's problems worsened, relator cut off customary short term loans. Bancshare's causes of action were breach of a duty of good faith, wrongful acceleration of the note, fraud, violation of the DTPA, and interference with business relations

[1]This statute has since been amended by Act of June 19, 1987, ch. 973, §1, 1987 Tex. Sess. Law Serv. 6630 (Vernon), which provides in pertinent part:

> [A]ll information obtained, either directly or indirectly, by the Banking Department relative to the financial condition of any bank or bank holding company (state banks) other than call reports and profit and loss statements, whether obtained through examination or otherwise, except published statements, and all files and records of said Department relative thereto shall be confidential, and shall not be disclosed by the Commissioner or any officer or employee of said Department.

(The underlined portions represent the additions and the parenthesis the deletions created by the amendment.)

between Bancshares and the individual defendant stockholders.

As discovery continued, relator attempted to acquire information during depositions of the defendants regarding the management and internal practices followed by First State Bank. The defendants refused to disclose this information. Relator also sought production of minutes of the board of directors of First State Bank from January 1983 to May 1986. In response to these discovery attempts, defendants filed a motion for a second protective order. Defendants claimed that questions relating to the internal management of First State Bank were not relevant to the case and that to permit this discovery would be unnecessarily burdensome. Defendants also asserted that the minutes of the board of directors of First State Bank were privileged under Article 342-210, and that they were not relevant because they contained, almost exclusively, information concerning internal management.

Thereafter, relator filed a motion requesting the court to compel discovery and to reconsider the first protective order. Relator alleged that information regarding the internal management of First State Bank was relevant in that it could lead to discovery of the true cause of the bank's failure. This information would thereby rebut defendants' allegation that relator's failure to provide loans caused the bank's failure. Relator also alleged that the information sought was relevant to their cause of action; specifically, it was relevant on whether the agreement to maintain capital ratios was breached.

Again, a hearing was held after which respondent granted a second protective order preventing discovery by relator of the following:

(1) All information relating to the internal management of First State Bank;

(2) The minutes of the meetings of First State Bank's board of directors; and

(3) Anything related to paragraphs one and two.

Relator now seeks by writ of mandamus to set aside both protective orders and to grant its motion to compel discovery. Relator alleges that the trial court's actions were a clear abuse of discretion in that the proper procedural standards were not met, that the information sought was clearly discoverable ("relevant"), and that the trial judge misinterpreted article 342-210.

Mandamus will not issue unless relator shows a clear abuse of discretion and there is no adequate remedy by appeal. Garcia v. Peeples, 734 S.W.2d 343, 345 (Tex. 1987). A writ of mandamus may issue in a discovery proceeding to correct a clear abuse of discretion by a trial judge. Allen v. Humphreys, 559 S.W.2d 798, 801 (Tex. 1977). This is because of the difficulty in determining harm on appeal, and because of judicial economy. Jampole v. Touchy, 673 S.W.2d 569, 576 (Tex. 1984).

Generally, information will be discoverable if it is reasonably calculated to lead to the discovery of material evidence. However, this broad rule is limited by the rule that the trial court may protect a party from unduly burdensome or expensive discovery, from harassment or annoyance, and from discovery of privileged matters. *Jampole*, 673 S.W.2d at 573; Gordon v. Blackmon, 675 S.W.2d 790, 793 (Tex. App. – Corpus Christi 1984) (original proceeding); Tex. R. Civ. P. 166(b)(a), 166b(4).

Of primary importance in this type of discovery process is that any party who seeks to exclude documents or other evidence from discovery has the affirmative duty to specifically plead the particular privilege, immunity, or exclusion claimed; to request a hearing; and to produce evidence substantiating

the claim. The trial court at this stage of the proceeding should then determine whether an *in camera* inspection is necessary. Peeples v. Fourth Supreme Judicial District, 701 S.W.2d 635, 637 (Tex. 1985).[2] This burden to produce evidence is an onerous one and is squarely and solely on the shoulders of the party seeking to prevent the discovery. *See* Medical Protective Co. v. Glanz, 721 S.W.2d 382 (Tex. App. – Corpus Christi 1986, writ ref'd); Western Casualty and Surety Co. v. Spears, 730 S.W.2d 821 (Tex. App. – San Antonio 1987) (original proceeding); Teran v. Longoria, 703 S.W.2d 300 (Tex. App. – Corpus Christi 1985) (original proceeding). It is an abuse of discretion for the trial court to deny discovery when no evidence is presented substantiating the exclusion or privilege claimed. *Weisel*, 718 S.W.2d at 58.

The record in this cause indicates there was no evidence before the court to establish the claimed privilege and exclusions.

The first protective order was sought solely on the basis that the information requested was privileged under article 342-210. This statute provided in part, "all information obtained by the Banking Department relative to the financial condition of state banks . . . shall be confidential, and shall not be disclosed by the Commissioner or any officer or employee of said Department." The existence and scope of this claimed privilege is not well-defined in Texas case law. However, privileges are not favored in the law and are to be strictly construed. Jordan v. Court of Appeals for the Fourth Supreme Judicial District, 701 S.W.2d 644, 647 (Tex. 1985). Even if this statute were to support the claimed privilege, there was no evidence that the information was "obtained by the Banking

[2]This is so whether the objection is on the grounds of privilege, relevancy or harassment. See Weisel Enterprises, Inc. v. Curry, 718 S.W.2d 56, 58 (Tex. 1986); Independant Insulating Glass/Southwest v. Street, 722 S.W.2d 798, 802 (Tex. App. – Fort Worth 1987) (oringinal proceeding).

Department" and that it was related "to the financial condition of a state bank" During the hearing the judge heard oral arguments by counsel, looked at copies of the statute, copies of cases dealing with the statute and a form or document issued by the Federal Deposit Insurance Corporation. However, there is no indication in the record before us that the judge reviewed any documents, records, or heard any live testimony regarding the applicability of the claimed privilege to the information requested.

Therefore, the proper procedure was not followed in the trial court. The defendants failed to produce evidence supporting the applicability of the purported privilege to the documents and communications.

The second protective order was requested on the grounds that information concerning the internal management was not relevant and that providing this information would be unduly burdensome to produce. It was also claimed that the minutes were privileged and not relevant.

There was no evidence presented that information concerning the internal management was not relevant and how discovery would be unduly burdensome. No live testimony, affidavits or documents were presented to the court substantiating these claims.

Regarding the minutes, there again was no evidence or proof to substantiate the conclusory allegations of Bancshares motion for protective order. There was no live testimony or affidavits, however, certain documents were tendered to the trial court as an exhibit. These documents purportedly were the board minutes and were alleged to be *part* of what the relator was seeking. They were tendered to the court for an *in camera* inspection. It does not appear that the documents were segregated according to the privilege or immunity claimed.

There is no indication in the statement of facts or in the record that the judge conducted an *in camera* inspection. Traditionally, the term "*in camera*" implies that the judge inspects documents in his chambers before a ruling. The judge heard oral arguments throughout the hearing and then ruled on the protective order. No recess was called during the hearing. The trial court's order does not reflect that he considered the documents or reviewed them *in camera* before making his ruling.

Since it appears no *in camera* inspection took place, and no other evidence was produced by the defendants, the trial judge abused his discretion in denying discovery.

Based on relator's argument that the protective orders were granted without the proper procedure being followed, we conditionally grant the writ and hold that the trial court's granting of the protective orders and refusal to grant relator's motion to compel discovery was clearly an abuse of discretion. We are confident that the Honorable Homer Salinas, Judge of the 92nd District Court, will abide by our decision. A writ of mandamus will issue only if he fails to do so.

PAUL W. NYE
Chief Justice

Opinion ordered published.
Tex. R. App. P. 90.

Opinion delivered and filed this
the 29th day of October, 1987.